No. 22-58

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

STATE OF TEXAS AND STATE OF LOUISIANA.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

JEFF LANDRY
Attorney General of Louisiana

ELIZABETH B. MURRILL
Solicitor General

LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third St.
Baton Rouge, Louisiana 70802
(225) 326-6766

Additional counsel listed with signature block

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JUDD E. STONE II
Solicitor General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Judd.Stone@oag.texas.gov
(512) 936-1700

QUESTIONS PRESENTED

1. Whether the state plaintiffs have Article III standing to challenge the Department of Homeland Security's Guidelines for the Enforcement of Civil Immigration Law.

2. Whether the Guidelines are contrary to 8 U.S.C. § 1226(c) or 8 U.S.C. § 1231(a), or otherwise violate the Administrative Procedure Act.

3. Whether 8 U.S.C. § 1252(f)(1) prevents the entry of an order to "hold unlawful and set aside" the Guidelines under 5 U.S.C. § 706(2).

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INTRODUCTION

"Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers." *Heckler v. Chaney*, 470 U.S. 821, 833 (1985). Agencies lack the "power to revise clear statutory terms" even when the agency believes those terms "turn out not to work in practice." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 327 (2014). Through the Immigration and Nationality Act, Congress has mandated that the Executive must detain specific criminal aliens (*e.g.*, aggravated felons) at a specific time (upon release from criminal custody) for a specific duration (during the removal period). Congress has also required the Executive to detain aliens subject to final orders of removal pending their removal.

The Executive would rather not. In September 2021, DHS issued *Guidelines for the Enforcement of Civil Immigration Law* ("Final Memorandum"), JA.110-20, which dispensed with Congress's "bright lines or categories" in favor of an "assessment of the individual and the totality of the facts and circumstances" for any alien who might be "a current threat to public safety." JA.113. DHS further created a "continuous" and "rigorous review" process to ensure "personnel's enforcement decisions" comply with the Final Memorandum, JA.118—*not* with the categories that Congress created or that this Court has repeatedly described as mandatory.

When Congress requires the Executive to act, the Executive lacks the authority to disregard that instruction. This Court should affirm the district court's judgment that the Final Memorandum harms States, is substantively and procedurally unlawful, and must be vacated.

STATEMENT

I. Legal Framework

A. The INA makes detention mandatory for some aliens and discretionary for others. For example, detention is ordinarily discretionary for aliens arrested under 8 U.S.C. § 1226(a): "On a warrant issued by the Attorney General, an alien may be arrested and detained pending a [removal] decision."[1] There, "the Attorney General" "may continue to detain the arrested alien" and "may release the alien on" either a bond subject to conditions or "conditional parole." *Id.* § 1226(a)(1)-(2).

But Congress made detention of other aliens mandatory. For example, Congress has commanded that "[t]he Attorney General shall take into custody any alien" who has committed certain serious crimes, including aggravated felonies, human trafficking, and certain gun crimes. *Id.* § 1226(c)(1); JA.473 & n.10. Likewise, section 1231(a)(2) provides that "the Attorney General shall detain" an alien ordered removed "[d]uring the removal period," which is defined as the 90 days after the alien is ordered removed, *id.* § 1231(a)(1)(A).

Congress has sometimes reinforced the mandatory nature of these obligations by specifying when or for how long the Executive must detain covered aliens. For example, criminal aliens subject to section 1226(c) must be detained "when the alien is released" from criminal custody. *Id.* § 1226(c)(1)(D). Aliens subject to section 1231(a)(2) shall be detained "during the removal period" after entry of a final removal order. *Id.* § 1231(a)(2).

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[1] Although the INA "refer[s] to the Attorney General, Congress has also empowered the Secretary of Homeland Security to enforce" that statute. *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2280 n.1 (2021).

Congress has occasionally underscored the mandatory nature of detention obligations by restricting the Executive's power to release aliens subject to those detention obligations. For example, section 1226(c)(2) sets forth a narrow circumstance when an alien subject to section 1226(c)(1)'s mandatory detention obligation may be released: when the alien's release is necessary to provide protection to a witness or individual cooperating with a major criminal investigation (or their families or close associates) *and* the Executive finds "that the alien will not pose a danger to the safety of other persons or property and is likely to appear for any scheduled proceedings."

B. "Congress adopted" these mandates "against a backdrop of wholesale failure by the INS, DHS's predecessor organization, to deal with increasing rates of criminal activity by aliens." *Demore v. Kim*, 538 U.S. 510, 518 (2003). Congress found that "[c]riminal aliens were the fastest growing segment of the federal prison population" and "a rapidly rising share of state prison populations as well." *Id.* Congress also had "evidence that one of the major causes of the INS'[s] failure to remove deportable criminal aliens was the agency's failure to detain those aliens during deportation proceedings." *Id.* at 519.

To address these deficiencies, Congress removed the Executive's previous discretion regarding the arrest and detention of certain criminal aliens. 8 U.S.C. § 1252(a) (1982). Starting in 1988, Congress directed that "[t]he Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction." 8 U.S.C. § 1252(a)(2) (1988). Later, in the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA), "Congress expanded mandatory detention past aggravated felons to other criminal aliens." *Demore*, 538 U.S. at 521.

Section 1231(a)(2) was also a part of IIRIRA and was "enacted against the same backdrop" of Executive failures. JA.360. Section 1231(a) "is part of a statute that has as its basic purpose effectuating an alien's removal." *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001). It "prevent[s] deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." *Demore*, 538 U.S. at 528.

C. Even before IIRIRA, INS understood that statutes providing that it "shall take into custody" an alien meant that the Executive "is statutorily precluded from exercising discretion either to release the alien upon his or her release from incarceration or to refrain from instituting deportation proceedings." Genco Op. No. 93-80 (INS), 1993 WL 1504027, at *3 (Oct. 8, 1993).

To address the Executive's concerns that section 1226(c)'s detention mandate might overwhelm detention capacity, Congress "enacted a two-year grace period for application of the criminal detention provisions in" section 1226(c). *Galvez v. Lewis*, 56 F. Supp. 2d 637, 641 (E.D. Va. 1999). During that grace period, insufficient bed space could excuse INS's mandatory duties under section 1226(c). Pub. L. No. 104-108, § 303, 110 Stat. 3009–586 (1996). INS sought to extend the two-year period, but Congress refused, and the mandate took effect. INS Issues Detention Guidelines After Expiration of TPCR, 75 No. 42 Interpreter Releases 1508, 1508 (Nov. 2, 1998).

D. Since IIRIRA, every Administration before this one has reaffirmed its understanding that section 1226(c) "eliminate[s] all discretion" and imposes a "duty to arrest . . . criminal alien[s]." Pet. Br. at *17, *23, *Nielsen v. Preap*, No. 16-1363, 2018 WL 2554770 (U.S. Jun. 1, 2018); *see also, e.g.*, Oral Arg. Tr. at *6-7, *Nielsen v. Preap*, No.

16-1363, 2018 WL 4922082 (U.S. Oct. 10, 2018); Pet. Br. at *1, *7, *11-12, *28, *30, *34, *Jennings v. Rodriguez*, No. 15-1204, 2016 WL 5404637 (U.S. Aug. 26, 2016); Pet. Br. at *2, *Demore v. Kim*, No. 01-1491, 2002 WL 31016560 (U.S. Aug. 29, 2002); Pet. Br. at *26-28, *Reno v. Ma*, No. 00-38, 2000 WL 1784982 (U.S. Nov. 24, 2000); *Matter of Garvin-Noble*, 21 I. & N. Dec. 672, 678 (BIA 1997).

And this Court has agreed, holding that section 1226(c) "carves out a statutory category of aliens who may *not* be released under § 1226(a)." *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018). Because "Congress has decided" that the discretionary section 1226(a) "procedure is too risky in some instances," Congress "adopted a special rule" that those "who have committed certain dangerous crimes and those with connections to terrorism" must be "arrested 'when [they are] released' from custody on criminal charges." *Nielsen v. Preap*, 139 S. Ct. 954, 959 (2019); *see also Demore*, 538 U.S. at 518-20.

Likewise, this Court has confirmed that "[d]uring the removal period, detention is mandatory" under section 1231(a)(2). *Johnson*, 141 S. Ct. at 2281; *see Zadvydas*, 533 U.S. at 683.

II. Factual Background

DHS now claims the discretion that previous administrations acknowledged Congress withheld. The Final Memorandum is the culmination of DHS's efforts to claim such discretion.

In January 2021, "then-Acting Secretary of Homeland Security David Pekoske issued a memorandum titled *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities*." JA.300. The January Memorandum "announced substantial changes to the enforcement of the Nation's immigration laws." JA.300. In lieu of directing the detention of all

aliens subject to Congress's mandatory-detention obligations, the January Memorandum declared that "the Department's priorities shall be" aliens suspected of terrorism, aliens who had recently unlawfully entered the United States, and aggravated felons determined to be public-safety threats. JA.300-01.

Then, "on February 18, 2021, Acting ICE Director Tae Johnson issued a memorandum titled *Interim Guidance: Civil Immigration Enforcement and Removal Priorities*." JA.302. Like the January Memorandum, the February Memorandum made aliens "who pose[] a threat to public safety and have been convicted of an aggravated felony or are involved with criminal gangs" a "public safety priority" but did not instruct officers to arrest or detain other aliens subject to section 1226(c) or section 1231(a)(2). JA.303-04 (quotation marks omitted).

Following these two interim memoranda, in September 2021, "Secretary Mayorkas issued the Final Memorandum from DHS," which "rescind[ed] the January and February Memoranda" and became effective in November 2021. JA.306 (quotation marks omitted). The Final Memorandum "identifies the same three priority enforcement categories as the previous two memoranda: national security, border security, and public safety." JA.306. But "[u]nlike the February Memorandum, the Final Memorandum's priorities are not presumptively subject to enforcement action." JA.306-07. And "the Final Memorandum's public safety priority no longer presumptively subjects aliens convicted of aggravated felonies to enforcement action, including detention." JA.307.

Under the Final Memorandum, immigration "enforcement," "including detention, is not to be determined according to any bright lines or categories." JA.113. Personnel cannot "rely on the fact of conviction or the result of a

database search alone when deciding to enforce the law." JA.308. Instead, they must "to the fullest extent possible, obtain and review the entire criminal and administrative record and other investigative information to learn of the totality of the facts and circumstances of the [alien's] conduct at issue." JA.308. The Final Memorandum neither "instruct[s] officers to prioritize aliens convicted of" numerous crimes covered by section 1226(c), nor requires the mandatory arrest or detention of these individuals. JA.308. Instead, aliens subject to statutory detention mandates receive the same "totality of the facts and circumstances" inquiry as other aliens. JA.307-08.

The Final Memorandum also establishes "rigorous" and "expeditious review of the enforcement actions taken" by personnel to ensure compliance. JA.309. This review provides "an entirely new avenue of redress in the event [aliens] are removed or detained in a manner that conflicts with" the Final Memorandum. JA.454-55.

III. Prior Proceedings

A. Preliminary injunction and first appeal

The States first challenged the January Memorandum as contrary to law, arbitrary and capricious, and procedurally invalid. *Texas v. United States*, No. 6:21-cv-00016, 2021 WL 1309766 (S.D. Tex. Apr. 6, 2021). The States sought a preliminary injunction against enforcement of the January and February Memoranda, 2021 WL 6331026 (S.D. Tex. Apr. 27, 2021), which the district court granted, *Texas v. United States*, 555 F. Supp. 3d 351 (S.D. Tex. 2021).

A Fifth Circuit panel stayed that injunction, *Texas v. United States*, 14 F.4th 332, 334 (5th Cir. 2021), but the en banc court vacated that stay, *Texas v. United States*, 24 F.4th 407, 408 (5th Cir. 2021). Petitioners dismissed their appeal upon issuance of the Final Memorandum. *Texas v.*

United States, No. 21-40618, 2022 WL 517281 (5th Cir. Feb. 11, 2022).

B. Subsequent trial and vacatur

The States then filed an amended complaint asserting that the Final Memorandum was contrary to law, arbitrary and capricious, and procedurally invalid. JA.72. The States moved to enjoin the Final Memorandum's enforcement or to postpone its effective date. *Texas v. United States*, No. 6:21-cv-00016 (S.D. Tex. Oct. 22, 2021), ECF No. 111. The district court consolidated the hearing on the States' motion with the trial on the merits. JA.293 n.11.

After trial, the district court concluded that the States had standing, JA.323-29, and that no obstacle prevented judicial review of the Final Memorandum, JA.330-68. It then concluded that the Final Memorandum was contrary to law, JA.369-74, arbitrary and capricious, JA.374-82, and procedurally invalid, JA.382-89. The court vacated the Final Memorandum, JA.393-400, but declined to enter injunctive relief, JA.400-02.

In reaching these conclusions, the district court made numerous findings of fact. It found that "when viewed in [the] light of the previous Memoranda and how they were implemented and enforced by DHS supervisors," many ICE officers and agents viewed the Final Memorandum as binding. JA.317. It likewise found that "officers do not have discretion to go outside the enforcement priorities." JA.315. Consequently, the court found that the "Final Memorandum increases the number of aliens with criminal convictions and aliens with final orders of removal released into the United States." JA.317.

The district court likewise found that this increase imposes costs on the States. JA.318-24. It explained that the Final Memorandum caused DHS to rescind immigration detainers—"administrative notice[s] from DHS" that

DHS "intends to take custody of a removable alien detained by [another] jurisdiction upon their release," JA.299—at dramatically higher rates. JA.311-13. And the district court found that numerous criminal aliens with rescinded detainers had reoffended, failed to comply with state parole conditions, or simply disappeared. JA.314.

C. The Fifth Circuit's stay denial

DHS sought a stay, which the Fifth Circuit denied in a 32-page published opinion. JA.451-86. Regarding standing, the Fifth Circuit agreed that "the uncontroverted evidence shows that the Final Memo shifted the cost of incarcerating or paroling certain criminal aliens from DHS to Texas," and that the "[S]tate incurs substantial costs associated with criminal recidivism, the rate of which is significant among the illegal alien population according to evidence presented in the district court." JA.459-60. The Fifth Circuit also noted that "Texas has actually absorbed, or at least will imminently absorb, the costs of providing public education and state-sponsored healthcare to aliens who would otherwise have been removed pursuant to federal statutory law." JA.460. The Fifth Circuit concluded that petitioners were unlikely to show that the district court clearly erred when it found that the Final Memorandum was a cause of Texas's costs, or that "Texas's costs would be eased if DHS stopped rescinding detainers pursuant to the Final Memo." JA.464.

The Fifth Circuit determined that the district court had jurisdiction to vacate the Final Memorandum notwithstanding 8 U.S.C. § 1252(f)(1) because vacatur and injunctive relief are distinct remedies, and because vacatur, unlike an injunction, "does nothing but re-establish the status quo absent the unlawful agency action." JA.466.

The Fifth Circuit then concluded that "DHS's three defenses of the Final Memo on its merits [we]re also likely

to fail." JA.472. *First*, the Fifth Circuit concluded that sections 1226(c) and 1231(a)(2) mandate detention. JA.474-77. It rejected petitioners' appeal to prosecutorial discretion based on *Town of Castle Rock v. Gonzalez*, 545 U.S. 748 (2005), because *Castle Rock* was "distinguishable on its facts" and because DHS's view of *Castle Rock* was "untenable and wholly unsupported" by the "plain text of the INA." JA.477-78.

Second, the Fifth Circuit concluded that DHS was likely arbitrary and capricious. As an initial matter, DHS considered recidivism among *all* aliens rather than the *criminal* aliens whom Congress required to be detained for public safety. JA.480-81. Moreover, DHS failed to adequately consider the costs that the Final Memorandum imposed on the States. JA.482. And, rather than considering the States' reliance interests, "[i]n a single paragraph citing no evidence," DHS "concluded that the States" had "no *reliance interests* in the enforcement of federal criminal immigration law according to the governing statutes." JA.483.

Third, the Fifth Circuit determined that the Final Memorandum likely required notice and comment. JA.484. Rather than an informal policy statement, "[b]oth the language found within and the mechanisms of implementing" the Final Memorandum "establish[ed] that it [was] indeed binding" and "remov[ed] DHS personnel's discretion to stray from the guidance or take enforcement action against an alien on the basis of a conviction alone." JA.484.

D. This Court's stay denial

After the Fifth Circuit denied a stay pending appeal, DHS sought a stay from this Court. JA.487. This Court denied that application but construed it as a petition for certiorari before judgment, which was granted. JA.487.

SUMMARY OF ARGUMENT

I. The States have standing. As the district court correctly found, the States bear costs related to law enforcement, recidivism, healthcare, and education that are traceable to the Final Memorandum and redressable by vacatur. That is all this Court's longstanding precedents require. Petitioners do not forthrightly ask this Court to revisit those precedents—let alone attempt to carry the heavy burden of overcoming *stare decisis*. That should end the matter.

Without admitting that their position would require this Court to overturn several of its precedents, petitioners invite this Court to make States disfavored litigants for purposes of Article III standing. This Court should decline that invitation. Contrary to petitioners' insistence, the States' theory of standing is not unbounded; rather, to successfully sue the federal government, States must overcome the same hurdles as other litigants—albeit with some amount of special solicitude under certain circumstances owing to their unique place in the federal system. *Massachusetts v. EPA* (*Massachusetts*), 549 U.S. 497, 520 (2007). That States challenge unlawful executive action is in part a consequence of the APA's broadly available cause of action and sovereign-immunity waiver, which Congress may revisit at any time.

II. On the merits, the Final Memorandum is unlawful for three independent reasons. *First*, it is contrary to law because sections 1226(c) and 1231(a)(2) mandate detention, as this Court has repeatedly stated. DHS identifies no INA provision that prevents this Court from reaching that conclusion. *Second*, the Final Memorandum is arbitrary and capricious because it failed to consider important aspects of the problems

criminal aliens create, including recidivism and States' reliance interests. *Third*, the Final Memorandum is procedurally invalid because it was not adopted through notice-and-comment procedures, which are required where agency action substantively changes a regulatory regime.

III. Finally, section 1252(f)(1) does not bar vacatur of the Final Memorandum—the only relief the district court ordered—for two reasons. *First*, petitioners' contention that the APA does not authorize vacatur at all ignores text, context, and decades of practice and precedent. *Second*, section 1252(f)(1)'s prohibition on orders that "enjoin or restrain" the operation of portions of the INA does not bar vacatur. Vacatur and injunctive relief are different remedies with different consequences that require different showings. And, as this Court has explained, vacatur is the less drastic remedy. Should this Court disagree, it should enter relief for the States as section 1252(f)(1) expressly allows.

ARGUMENT

I. The District Court Correctly Concluded that the States Have Standing.

The States have standing under a straightforward application of this Court's precedents. "To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (citation omitted). This Court reviews the district court's post-trial findings of fact for clear error. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021). And only one State need establish standing, *Massachusetts*, 549 U.S. at 518, for which even a modest monetary loss can suffice, *Czyzewski v. Jevic Holding Corp.*, 137 S.

Ct. 973, 983 (2017); *see also Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801-02 (2021).

A. The States suffered a redressable injury traceable to the Final Memorandum.

1. After making extensive factual findings, the district court concluded that "Texas has suffered a concrete and particularized, actual injury" both "[a]s to its finances" and "as *parens patriae*." JA.326. As the district court explained, "[t]he Final Memorandum increases the number of aliens with criminal convictions and aliens with final orders of removal released into the United States" and thereby increases the States' incarceration costs, JA.317-18, costs associated with recidivism, JA.319-20, education costs, JA.320-21, and healthcare costs, JA.322-23.

DHS's newfound practice of regularly rescinding immigration detainers makes these harms plain. Consistent with the Executive's mandatory detention obligations, until "fiscal year 2020, detainers" were rarely rescinded, and "no more than a dozen detainers were dropped per year" between 2017 and 2020. JA.311. But "[f]rom January 20, 2021 through February 15, 2022, ICE rescinded detainers on 170 criminal aliens" in Texas and reissued only 29. JA.311. "Of the 141 criminal aliens whose detainers remained rescinded, 55 were serving a sentence for . . . serious drug offenses." JA.312. More than two-thirds of those 141 were ultimately paroled, each inflicting costs on the State. JA.318-19. Of even greater concern, "[a]t the time this case was tried," 17 of those paroled "had failed to comply with their parole supervision and four had committed new criminal offenses." JA.312. "At least one remain[ed] at large in Texas with a warrant for his arrest." JA.312. As the Fifth

Circuit noted, this "detainer data" was "uncontroverted." JA.459.

More broadly, "[t]he number of convicted criminal aliens in ICE custody per day has dropped dramatically in the months" between the January Memorandum and trial. JA.313. And "[t]he same decline is also evident in removals carried out by ICE" which "make clear that the Final Memorandum is dramatically impacting civil immigration enforcement." JA.315-16. This places Texans at risk from recidivism by "increas[ing] the number of aliens with criminal convictions and aliens with final orders of removal released into the United States." JA.317. Again, the Fifth Circuit noted that "evidence show[ing]" this effect of the Final Memorandum was "uncontroverted." JA.459.

The district court also found these injuries traceable to the Final Memorandum and redressable by its vacatur. The Final Memorandum has "led to aliens remaining in [Texas's] custody longer than they otherwise would, which imposes additional costs on the State." JA.327. "It has also caused, and continues to cause," both "increases in the number of criminal aliens and aliens with final orders of removal released into Texas," and "increases in Texas's expenditures on public services such as healthcare and education." JA.327-28.

That is all this Court's standing precedents require. The Final Memorandum causes the States real, particularized, and concrete harms, *Uzuegbunam*, 141 S. Ct. at 799-800, which are traceable to the Final Memorandum, *Massachusetts*, 549 U.S. at 517-18, and are redressable by vacatur, *Uzuegbunam*, 141 S. Ct. at 801. Moreover, vacatur need not completely address the States' harms; "the ability to effectuate a partial remedy satisfies the

redressability requirement." *Id.* (quotation marks omitted).

2. Petitioners attempt to avoid this conclusion in three ways, none of which has merit.

First, petitioners contend (at 18-20) that the States have no interest in "'procuring enforcement of the immigration laws' against third parties." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984). But this is not the interest that the States asserted or that the district court found. Instead, the States assert an interest in avoiding the harms caused by the Final Memorandum to their fiscs and residents. *Supra* pp. 8-9, 13-14. These are "legally and judicially cognizable" injuries of the sort repeatedly recognized by this Court. *Raines v. Byrd*, 521 U.S. 811, 819 (1997).

Moreover, the States do not challenge any individual decision made by DHS, but the Final Memorandum and its consequences. *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973), is not to the contrary. There, this Court explained that "if appellant were granted the requested relief, it would result in the jailing of the child's father," but the "prospect that prosecution" would redress the plaintiff's injuries was "speculative." *Id.* Here, by contrast, citing numerous findings of facts, the district court and court of appeals concluded that the States' injuries could be redressed by vacatur of the Final Memorandum. JA.327-28; JA.464.

Second, petitioners bemoan (at 20-21) various factual findings of the district court. But they cannot—and scarcely attempt to—show that those factual findings are clearly erroneous. *Brnovich*, 141 S. Ct. at 2349. At most, petitioners suggest that the evidence is amenable to multiple interpretations, but "the very premise of clear error review is that there are often two permissible . . . views

of the evidence." *Cooper v. Harris*, 137 S. Ct. 1455, 1468 (2017) (quotation marks omitted). DHS's disagreement with the view taken by the district court does not show that the court clearly erred.

Third, petitioners contend (at 22) that the district court erred in finding the States have standing at least as to 8 U.S.C. § 1231. This simply ignores findings that "[t]he Final Memorandum increases the number of aliens . . . with final orders of removal released into the United States," JA.317; *see also* JA.327, which "has caused, and continues to cause, increases in Texas's expenditures on public services such as healthcare and education," JA.327-28. Again, DHS fails to show that the district court clearly erred in making these findings.

3. Even if the States had not shown standing under the test applicable to every other litigant—and they have—"States are not normal litigants for purposes of invoking federal jurisdiction," *Massachusetts*, 549 U.S. at 518, and are therefore "entitled to special solicitude in [this Court's] standing analysis," *id.* at 520. Although the States do not need special solicitude to establish standing here, they nonetheless benefit from it.

A State that has a procedural right to challenge a given action, which affects one of the State's quasi-sovereign interests, will receive special solicitude. *Id.* at 516-20. Massachusetts had a procedural right to challenge the EPA's decision not to regulate certain greenhouse gases under the Clean Air Act. *Id.* at 519-20. The States here have a concomitant right under the APA. *See* 5 U.S.C. §§ 702, 706. And, just as in *Massachusetts*, the States' challenge involves an agency's failure to protect certain formerly "sovereign prerogatives [that] are now lodged in the Federal Government." 549 U.S. at 519. These include the sovereign "power to admit or exclude

aliens," *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020), and the "quasi-sovereign interest[s] in the health and well-being—both physical and economic—of [their] residents in general," *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982).

DHS's contrary contention (at 23) that special solicitude is about protecting sovereign territory is meritless. Although *Massachusetts* involved state lands, this Court's analysis was not so limited. 549 U.S. at 516-20. Control over immigration is a "sovereign prerogative" just as much as a sovereign's control over its territory, *Thuraissigiam*, 140 S. Ct. at 1982, which now resides with the federal government, *Arizona v. United States*, 567 U.S. 387, 398-400 (2012).

Although the INA does not give third parties a procedural right to challenge immigration enforcement or policy, the APA gives those adversely affected by DHS's actions such a right. *See* 5 U.S.C. § 702. States "bear[] many of the consequences of unlawful immigration," which is why this Court recognized "the importance of immigration policy to the States." *Arizona*, 567 U.S. at 397. They are entitled to special solicitude in cases like this one.

B. This Court should not make States disfavored litigants in its standing analysis.

1. DHS asks (at 11-18) this Court to create a rule that States may only challenge federal actions that affect the States directly or when the State is the "object of the challenged action." Doing so would require this Court to ignore or overturn several cases.

Petitioners' object-of-the-challenged-action rule ignores the bedrock principle that the federal government may not regulate the States directly. "[T]he Framers explicitly chose a Constitution that confers upon Congress

the power to regulate individuals, not States." *New York v. United States*, 505 U.S. 144, 166 (1992). "[C]onspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States." *Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018). A rule prohibiting States from suing the federal government unless the federal government has directly regulated States is, at first approximation, a rule that States may not sue at all.[2]

That constitutional flaw aside, DHS argues (at 11-13) that no matter how much harm a State might suffer because of executive action, that State lacks standing so long as that injury is imposed indirectly. That ignores that the injury in *Massachusetts* arose indirectly: Massachusetts based its injury on the possibility that the EPA's decision whether to regulate greenhouse gases might contribute to a rise in sea levels, which might contribute to the erosion of its shoreline. *Massachusetts*, 549 U.S. at 522-23. Because petitioners assert that such a downstream effect is non-cognizable, accepting petitioners' argument would require overruling *Massachusetts*.

So, too, with this Court's recent decision in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), where a State "assert[ed] a number of injuries—diminishment of political representation, loss of federal funds, degradation of census data, and diversion of resources—all of which turn[ed] on their expectation that reinstating a citizenship question will depress the census response rate and lead to an inaccurate population count." *Id.* at

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[2] Nor do petitioners explain how their principle would operate elsewhere. They do not address whether it would control a State's standing to sue its sister States or foreign states, officials, or corporations. A principle that operates solely to disadvantage States litigating against the federal government is no principle at all.

2565. The change in the census did not directly affect or act on the State. Nevertheless, this Court concluded that the downstream consequences—including loss of federal funds—would be "the predictable effect of Government action on the decisions of third parties," and that these injuries could support standing. *Id.* at 2566. If petitioners' theory is correct, this holding is also wrong.

Other cases suggest the same result. DACA at most indirectly affected the University of California. *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020). DAPA likewise indirectly injured Texas, yet an equally divided Court affirmed a judgment holding the program unlawful. *United States v. Texas*, 579 U.S. 547, 548 (2016). And petitioners' theory vitiates numerous decisions by the lower federal courts, which have consistently "recogniz[ed] standing to protect proprietary interests" and "sovereign interests"—even from indirect harm. 13B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3531.11.1 & nn.4-5 (3d ed. 2022). Even when this Court has decided that States lacked standing, it has employed its ordinary standing analysis. *E.g.*, *California v. Texas*, 141 S. Ct. 2104, 2113 (2021).

DHS never asks this Court to overrule any—let alone all—of these cases. For good reason: it cannot meet its burden to overcome *stare decisis. E.g.*, *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019).

2. Petitioners fail to ground their direct-injury rule in precedent or even sound policy.

a. DHS's reliance (at 12-13) on *Florida v. Mellon*, 273 U.S. 12, 18 (1927), is misplaced. There, a State challenged the collection of federal inheritance taxes when state law barred such taxes. *Id.* at 15. This Court resolved the case on the merits by concluding that, as a law "passed by Congress in pursuance of its power to lay and collect

taxes," the federal inheritance tax was "the supreme law of the land." *Id.* at 17. Only then did the Court describe the State's theory of injury as "purely speculative, and, at most, only remote and indirect." *Id.* at 18. *Florida* has little relevance here, where the district court found that the States *have* suffered concrete harms from the Final Memorandum. *Supra* pp. 8-9. The States' standing arises from these concrete harms and not, as petitioners contend, from the "derivative effects" of federalism, Pet. Br. 12 (citing *Printz v. United States*, 521U.S. 898, 920 (1997)), or from a generalized "injur[y]" to State economies, *id.* at 13 (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992)).

This Court's unreasoned order in *Massachusetts v. Laird*, 400 U.S. 886 (1970), is similarly distinguishable for at least three reasons. *First*, that case involved a bill of complaint regarding the legality of the Vietnam War, which was a nonjusticiable political question. *E.g.*, *Sarnoff v. Connally*, 457 F.2d 809, 809-10 (9th Cir. 1972) (per curiam) (collecting authorities). That doctrine is not at issue here. *Second*, Massachusetts had, at most, a generalized harm arising from that War. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974). By contrast, the district court found here that the States suffered specific, particularized harms not shared by the public at large. *Supra* pp. 8-9. *Third*, it is unclear what cause of action Massachusetts could have asserted. Here, the APA provides a cause of action. 5 U.S.C. § 702.

b. Petitioners' less-relevant policy objections fare no better. DHS complains (at 16-17) that States sometimes challenge executive actions, pointing to litigation brought in recent years by California and Texas. But as the scope of the federal government has expanded to reach nearly every aspect of daily life, *NFIB v. Sebelius*,

567 U.S. 519, 551 (2012) (plurality op.), it should come as no surprise that executive actions injure States with increasing frequency.

In any event, the number of lawsuits against the federal government filed by States pales in comparison to some other litigants. While DHS complains (at 16) that California filed 122 lawsuits against the Trump Administration and Washington filed 82, the Center for Biological Diversity boasted that it "resisted the Trump administration in every way possible" through "266 lawsuits against the Trump administration from its inception to its last day." *Administration Lawsuit Tracker*, CENTER FOR BIOLOGICAL DIVERSITY, https://www.biologicaldiversity.org/campaigns/trump_lawsuits/ (last visited Oct. 17, 2022). And the ACLU filed at least "400 legal actions against the Trump administration." Am. Civil Liberties Union, *Press Release: ACLU Has Filed 400 Legal Actions Against Trump Administration* (Aug. 17, 2020), https://www.aclu.org/press-releases/aclu-has-filed-400-legal-actions-against-trump-administration. Even if the Executive must respond to an increase in politically salient lawsuits, singling out States for disfavored treatment would not remedy the problem.

Petitioners (at 15-17) lament the "startling implications" of the States' standing. But petitioners' quarrel is with the cause of action that the APA provides to those "suffering legal wrong[s] because of agency action." 5 U.S.C. § 702. Tellingly, petitioners do not contend that the APA has "statutorily grant[ed] the right to sue to a plaintiff who would not otherwise have standing." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Raines*, 521 U.S. at 820 n.3)). Moreover, the APA supplies the States with not only a cause of action, but also a waiver of the federal government's sovereign immunity.

Bowen v. Massachusetts, 487 U.S. 879, 912 (1988). Thus, petitioners' quarrel is with choices Congress made in the APA—not the States' views on Article III standing.

3. Finally, DHS contends (at 13-15) that various historical analogues suggest that indirect effects of federal regulations are not cognizable injuries. At the outset, this argument is foreclosed by this Court's precedents. *Supra* pp. 18-19.

But it is also ahistorical. For example, DHS suggests (at 14) that the absence of a State judicial challenge to the Alien and Sedition Acts illustrates that the States believed they lacked standing to challenge those laws. It is unclear what, if anything, that absence signifies. It may have reflected the fact that, save for a brief window between 1801 and 1802, Congress did not statutorily vest the federal courts with federal-question jurisdiction until 1875. 13D CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3561 (3d ed. 2022). It may have reflected beliefs that the federal government enjoyed sovereign immunity or that States lacked a cause of action, problems that the APA did not resolve until 1946, Pub. L. No. 79-404, 60 Stat. 237. It could have been for any number of other partisan or practical reasons, or for no reason at all.

And contrary to petitioners' assertions (at 15), neither *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 77 (1868), nor *Raines*, 521 U.S. at 826, are analogous. *Georgia* rejected a challenge to the legality of Reconstruction as a nonjusticiable question, 73 U.S. (6 Wall.) at 77, and *Raines* refused to recognize a group of legislators' arguments for standing based on the "meaning" and "integrity" of their votes, 521 U.S. at 825. Not even petitioners claim that the legality of the Final Memorandum is a political question, and the States' standing rests on

concrete financial injuries—not abstract claims of political power.

By contrast, "certain harms readily qualify as concrete injuries under Article III." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021). "The most obvious are traditional tangible harms, such as physical harms and monetary harms." *Id.* The States have shown, and the district court found, that the Final Memorandum inflicts traditional monetary harms on the States. That is enough to establish the States' standing, and this Court should reject petitioners' attempts to require more.

C. The States have ***parens patriae*** standing.

A State has *parens patriae* standing to protect its quasi-sovereign interests in "the health and well-being of its residents," including their "economic and commercial interests." *Snapp*, 458 U.S. at 609. Here, the States seek to protect the health and well-being of their residents by protecting them from criminal aliens that Congress has ordered detained. They thus have standing as much as Puerto Rico did to protect its residents from labor-market discrimination. *Id.* at 608-09.

Massachusetts v. Mellon (*Mellon*), 262 U.S. 447 (1923), is not to the contrary. That case addressed only suits seeking to protect citizens "from the operation of [federal] statutes." *Id.* at 485. Here, the States seek "to assure [their] residents that they will have the full benefit of federal laws designed to address" the problems caused by criminal aliens that Congress has ordered detained. *Snapp*, 458 U.S. at 609-10. Moreover, this Court has already clarified that no quasi-sovereign interests were implicated in *Mellon*. *Massachusetts*, 549 U.S. at 520 n.17. *Mellon* is therefore of little use to petitioners here, where the States have proven harms to the health and well-being of their residents at trial.

II. The Final Memorandum Is Substantively and Procedurally Invalid.

The district court also correctly found that the Final Memorandum violates the APA in three ways: (1) it contravenes the plain text of sections 1226(c) and 1231(a), (2) it is arbitrary and capricious because it failed to reasonably address important aspects of the problem it purports to solve and failed to consider the States' important reliance interests, and (3) it did not undergo notice and comment.

A. The Final Memorandum is contrary to the INA's detention mandates.

The Final Memorandum is contrary to sections 1226(c) and 1231(a).

1. Section 1226(c) provides that "[t]he Attorney General shall take into custody any alien who" has committed certain crimes "when the alien is released" from criminal custody. 8 U.S.C. § 1226(c)(1). This provision ensures that these aliens—who are subject to removal—will be detained "during removal proceedings" instead of threatening public safety. *Demore*, 538 U.S. at 517-18. This Court has described this provision as mandatory. *Nielsen*, 139 S. Ct. at 958-59; *id.* at 973-74 (Kavanaugh, J., concurring); *id.* at 973 (Thomas, J., concurring in part); *Jennings*, 138 S. Ct. at 847; *Demore*, 538 U.S. at 517-18.

The Final Memorandum contravenes this mandate in two ways. *First*, it misconstrues a mandatory obligation as a discretionary one by instructing immigration personnel to make "an assessment of the individual and the totality of the facts and circumstances" relevant to detention or immigration enforcement. JA.113. Section 1226's mandatory obligation allows no such latitude: Congress has already determined that the only relevant

"fact or circumstance" to detention under that section is the fact an alien has committed a relevant crime.

Second, it instructs immigration personnel to consider extra-statutory "mitigating factors" when determining whether to detain an alien subject to mandatory detention, such as an alien's "lengthy presence in the United States," "mental condition that may have contributed to the criminal conduct," or the "time since an offense" was committed. JA.114-15. Again, Congress has already determined the facts and circumstances which might mitigate the need for detention. The Executive may release an alien subject to section 1226(c)'s detention mandate "only if that release is necessary to" protect a witness or individual cooperating with a criminal investigation (or the immediate family or close associates of such a person), and even then, only when the alien has demonstrated that he will not endanger public safety and will appear for any scheduled proceeding. 8 U.S.C. § 1226(c)(2). Read in tandem with section 1226(c)'s detention mandate, this exclusive avenue for release forecloses reliance on other considerations to justify releasing an alien subject to mandatory detention.

An example illustrates the Final Memorandum's illegality. Suppose a State is prepared to release an alien convicted of trafficking underage children. Section 1226 requires DHS to detain this alien. *See* 8 U.S.C. § 1226(c)(1)(A) (applying to aliens who have committed offenses under "section 1182(a)(2) of this title"); *id.* at § 1182(a)(2)(H) (human traffickers). Under the Final Memorandum, however, an immigration officer cannot treat the fact of the trafficker's conviction as a "bright line[]" requiring detention. JA.113. Instead, the immigration official must investigate whether there are "mitigating factors," such as whether the trafficker has a

"physical or mental condition requiring care or treatment," JA.114, or the trafficker has previously exercised "workplace or tenant rights," JA.117. And even though nothing in section 1226(c)'s detention mandate makes those facts relevant, if the immigration officer fails to weigh these considerations, the Final Memorandum gives the trafficker a right to administrative review. JA.310.

2. Similarly, section 1231(a) provides that "when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days." 8 U.S.C. § 1231(a)(1)(A). And "[d]uring the removal period, the Attorney General shall detain the alien." *Id.* § 1231(a)(2). Like section 1226, detention under section 1231 is mandatory. *Johnson*, 141 S. Ct. at 2281. But the Final Memorandum directs immigration officers to exercise the same forms of "discretion" outlined above in the "execution of removal orders," JA.111, which the district court found has resulted in the release of aliens subject to removal orders, *see* JA.312; JA.317.

3. Petitioners first respond (at 25-27) that statutory bars in sections 1226(e) and 1231(h) "preclude" review of the Final Memorandum. Not so.

a. Section 1226(e) provides that "[t]he Attorney General's discretionary judgment regarding the application of this section shall not be subject to review." 8 U.S.C. § 1226(e). But this Court has said that section 1226(e)'s limitation "applies only to discretionary decisions about the application of § 1226 to particular cases." *Nielsen*, 139 S. Ct. at 962. It does not preclude challenges involving DHS's systemic application of section 1226's "statutory framework." *Jennings*, 138 S. Ct. at 841; *Demore*, 538 U.S. at 516-17. Petitioners' reliance on the supposed "breadth" of section 1226(e)'s subsidiary limitations

"regarding" "any" given alien are thus misplaced. Pet. Br. 25 (quoting *Patel v. Garland*, 142 S. Ct. 1614, 1622 (2022)). In any event, petitioners forfeited any reliance on section 1226(e) by failing to raise (or even to cite) it in their stay application, which petitioners invited the Court to construe as a petition for certiorari before judgment. S. Ct. R. 14.1(a).

DHS attempts (at 26) to distinguish those precedents because they involved "habeas review," a context in which this Court requires a "particularly clear statement" for Congress to foreclose review. But this Court likewise requires a clear statement to foreclose challenges to "administrative action," including for "legislation regarding immigration." *Kucana v. Holder*, 558 U.S. 233, 251-52 (2010); *see also Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020). So this is no distinction at all.

Petitioners also have another problem: they claim (at 2) that the Final Memorandum is an exercise of authority under 6 U.S.C. § 202(5). That does not change the merits equation—statutory "limitations" like section 1226(c) may preclude petitioners' exercise of authority under other statutes. 5 U.S.C. § 706(2)(C). But petitioners' reliance on 6 U.S.C. § 202(5) has fatal ramifications for their *reviewability* argument: section 1226(e)'s bar on review applies only to actions taken "under th[at] *section*." 8 U.S.C. § 1226(e) (emphasis added). If, as DHS claims, the Final Memorandum is an action taken under section 202 of Title 6, then review of that action cannot be barred by a limitation that textually applies only to section 1226 of Title 8.

b. Section 1231(h) also does not bar this challenge. It provides: "Nothing in this section shall be construed to create any substantive or procedural right or benefit that

is legally enforceable by any party against the United States or its agencies or officers or any other person." 8 U.S.C. § 1231(h). Nothing in this provision mentions, much less forecloses, judicial review. Congress knows how to limit judicial review. For example, it has provided that "no court shall have jurisdiction to review" multiple types of immigration orders, "[n]owithstanding any other provision of law." *Id.* at § 1252(a)(2)(A). That use of "disparate" language must be treated as "intentional[]." *Kucana*, 558 U.S. at 249.

History and context also show that section 1231(h) was designed to overturn the Ninth Circuit's interpretation of section 1231's predecessor statute, which that court interpreted as giving removable aliens a judicially enforceable right to *speedy* removal. *Soler v. Scott*, 942 F.2d 597, 601-04 (9th Cir. 1991). Congress responded in 1994 by amending the INA through the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305. Section 225 of that statute included language similar to now-section 1231(h) renouncing the creation of any "substantive or procedural right" by section 1231's predecessor. *Id.*

The Ninth Circuit recognized the upshot: the "intended target of section 225 . . . must have been our Ninth Circuit law allowing" aliens to seek speedy removal. *Campos v. INS*, 62 F.3d 311, 314 (9th Cir. 1995). The legislative record also reflects this purpose. *See* 140 Cong. Rec. 28,441 (1994). In IIRIRA, Congress transferred this provision to now-section 1231(h). And it again indicated that the provision was intended to prevent what the Ninth Circuit had previously enabled—alien suits seeking speedy removal. *See* H.R. Rep. No. 104-828, at 219 (1996).

DHS does not dispute this context. Instead, it contends (at 26-27) that section 1231(h) applies to "*any* party," not just aliens challenging a slow removal. Here, context shows that Congress meant to foreclose aliens from claiming a "substantive or procedural right" to fast removal—not to foreclose States from challenging the Final Memorandum.[3]

4. Petitioners' five merits arguments regarding section 1226 and two merits arguments regarding section 1231 are also wrong.

a. *First*, DHS asserts (at 27) that section 1226(c) "applies only during the pendency of removal proceedings." Petitioners say (at 28) this matters because they have "absolute discretion" whether to initiate removal proceedings and detain aliens before removal. But section 1226(c)'s text does not contain petitioners' "removal proceedings" limitation: it instructs that "[t]he Attorney General shall take into custody" classes of aliens "when the alien is released" from criminal custody. 8 U.S.C. § 1226(c)(1). It is textually irrelevant whether petitioners intend to initiate removal proceedings; the statute requires detention when the alien is released from criminal custody.

Second, petitioners argue (at 28) that section 1226(c)'s detention mandate should not be read to "displace [their] traditional discretion over decisions to apprehend individuals not yet in custody." To whatever extent such discretion exists in other contexts, it cannot be

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[3] Petitioners' reliance (at 27) on 8 U.S.C. § 1252(g) is also misplaced. The States are not raising claims "by or on behalf of any alien" per section 1252(g), and that section provides no "clear and convincing evidence of legislative intention to preclude review." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986).

squared here with the statute's "mandatory language: 'shall,'" which imposes "an obligation." *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020); *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016). Nor can it be reconciled with Congress deeming it "too risky" to release aliens that section 1226(c) covers. *Nielsen*, 139 S. Ct. at 959.

Third, petitioners argue (at 28-29) that Congress does not lightly abrogate DHS's enforcement discretion. As history shows, Congress did not do so lightly—it did so "against a backdrop of wholesale failure by the INS, DHS's predecessor organization, to deal with increasing rates of criminal activity by aliens." *Demore*, 538 U.S. at 518. Congress considered this "wholesale failure" exceptionally serious and "had before it evidence that one of the major causes of the INS'[s] failure to remove deportable criminal aliens was the agency's failure to detain those aliens during deportation proceedings." *Id.* at 519. It therefore remedied that failure by making such detention mandatory.

Petitioners' contrary authority is inapposite. One cited case did not involve executive enforcement discretion at all, but a claim that a city ordinance violated due process. *See City of Chicago v. Morales*, 527 U.S. 41, 46 (1999). Petitioners' remaining authorities involved challenges to individual non-enforcement decisions—not regulations that change an enforcement scheme altogether. *See Castle Rock*, 545 U.S. at 751 (addressing an alleged "fail[ure] to respond properly" to violations of a restraining order); *Heckler*, 470 U.S. at 823 ("investigatory and enforcement actions" regarding lethal-injection drugs); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 472-73 (1999) (individual aliens' challenges to immigration decisions).

This Court has never held that an agency's generally applicable rules about how or whether it will enforce the law *in toto* are beyond scrutiny as exercises of putative enforcement discretion. *Cf. OSG Bulk Ships v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998); *Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996); *Crowley Caribbean Transp. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994). Rightly so: any such theory of "enforcement discretion" would conflict with the Executive's obligation to see the laws faithfully executed. U.S. CONST. art. II, § 3; *see also United States v. Smith*, 27 F. Cas. 1192, 1203, 1229 (C.C.D.N.Y. 1806) (Paterson, J.) (Executive "cannot suspend [a statute's] operation, dispense with its application, or prevent its effect . . . . If he could do so, he could repeal the law, and would thus invade the province assigned to the legislature.").

Fourth, petitioners contend (at 29-30) that Congress has not appropriated the funds necessary to detain all aliens required by section 1226(c)(1). But Congress excused the Executive's failure to comply with section 1226(c)(1)'s detention mandate only during the "two-year grace period" following IIRIRA. *Galvez*, 56 F. Supp. at 641. INS asked for an extension, but Congress refused. *See* INS Issues Detention Guidelines, *supra*. On DHS's theory, Congress's grace period was superfluous because petitioners retained the authority to excuse their own noncompliance indefinitely. This Court has already rejected that theory. *See Nielsen*, 139 S. Ct. at 969-70. Instead, Congress enacted the grace period understanding that funding problems alone do not permit the Executive to re-write congressional commands. *In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2013) (Kavanaugh, J.); *see also Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 189 (2012).

In any event, this Court should view petitioners' claims about their inability to comply with section 1226(c) skeptically. The district court found that "the Government has not acted in good faith" regarding its "insufficient resources and limited detention capacity." JA.358-59. And while "blam[ing] Congress for [its] deficiency" in bed space, petitioners have "persistently underutilized existing detention facilities," JA.359, and have "submitted two budget requests in which [they] ask[] Congress *to cut* those very resources and capacity by 26%," JA.358.

Fifth, petitioners are wrong (at 29-30) that 6 U.S.C. § 202(5)'s general grant of authority to establish "immigration enforcement policies and priorities" overrides section 1226(c). When one statute gives a "general permission" that is "contradicted by a specific prohibition" in another, the "contradiction" is "eliminate[d]" by construing the "specific provision" as "an exception to the general one." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). Whatever general authority DHS possesses is limited by section 1226(c).

b. Petitioners' arguments regarding section 1231 are likewise meritless. *First*, petitioners contend (at 31) that, although section 1231(a)(2) mandates detention, it does not "speak to apprehension." Said differently, petitioners argue that aliens who are detained must stay detained, but aliens need not be arrested in the first place. This argument depends on petitioners' interpretation of the term "detain" to mean something akin to "keep in custody" only. And that, in turn, depends on a "strange" inference about Congress's intent—namely, that it would inexplicably "forbid the release of aliens who need not be arrested in the first place." *Nielsen*, 139 S. Ct. at 970.

DHS's reading ignores that the word "detain" is often understood to mean "arrest." *See* GARNER'S DICTIONARY OF LEGAL USAGE 270 (3d ed. 2011). Petitioners note (at 31) that other INA sections use "detention" in conjunction with "apprehension" and "arrest," and contend that detention must not include arrests. But this observation cuts the other way: it shows that Congress used "apprehension" *and* "arrest" to denote taking one into custody. There is nothing remarkable about Congress using "detain" for the same purpose. "Though one might wish it were otherwise," legislators "more than rarely use the same word to denote different concepts, and often (out of a misplaced pursuit of stylistic elegance) use different words to denote the same concept." A. SCALIA & B. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (2012); *see also Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 540 (2013).

Second, DHS contends (at 32) that in all events it may release at least *some* aliens with removal orders because section 1231(a)(2)'s "second sentence" provides that DHS may "under no circumstance" release aliens with a removal order who have committed certain crimes. Accordingly, they say section 1231(a)(2)'s *first* sentence—providing that petitioners "shall detain the alien"—must provide discretion to release *other* types of aliens or the second sentence is superfluous. But the second sentence reflects "belt-and-suspenders caution," which is not atypical. *See Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1350 n.5 (2020); *Territory of Guam v. United States*, 141 S. Ct. 1608, 1615 (2021). The subset of aliens subject to section 1231(a)(2)'s second sentence includes those convicted of serious crimes and terrorists. It was prudent for Congress to emphasize that no matter what contingencies may arise, terrorists must not be released.

Petitioners' claim that they have unbridled discretion to release other aliens subject to section 1231(a)(2) is contrary to law and thus a violation of the APA.[4]

B. The Final Memorandum is arbitrary and capricious.

The Final Memorandum is also arbitrary and capricious, 5 U.S.C. § 706(2)(A), because it lacks a "reasonable and reasonably explained" justification, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021).

1. *First*, the Final Memorandum failed to consider "recidivism among the relevant population at issue in this case," namely aliens subject to sections 1226(c) and 1231(a)(2). JA.481. That is "an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*, 463 U.S. 29, 43 (1983), because the high rates of abscondment and recidivism are the reasons Congress enacted section 1226(c) in the first place. *See Demore*, 538 U.S. at 513.

Petitioners nonetheless contend (at 34) that the Final Memorandum considers this issue by allowing immigration officers to weigh criminal attributes as "aggravating" factors in their case-by-case analysis. *See* JA.146. But petitioners miss the core problem: the Final Memorandum's requirement that immigration officers weigh these factors *at all* instead of following Congress's mandates. JA.113. DHS offered no reasonable explanation for *that* decision.

Petitioners also contend (at 34) that they consulted recidivism data. That data ostensibly shows that "reconviction rates drop off significantly for" certain

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[4] Petitioners' reliance (at 32) on past Executive practice must yield to the INA. "[P]ast practice does not, by itself, create power." *Medellín v. Texas*, 552 U.S. 491, 532 (2008).

individuals. JA.147. But that is a non-sequitur—that some criminal aliens may not recidivate does not explain why DHS has decided to ignore Congress's instructions as to covered criminal aliens. Congress was plainly aware when it enacted section 1226(c) that not every alien it ordered detained would recidivate if released, but Congress ordered them detained nonetheless. Even assuming DHS had discretion to override that judgment, it has no "reasonable and reasonably explained" basis for doing so. *Prometheus*, 141 S. Ct. at 1158.

Second, the Final Memorandum failed to account for the States' reliance interests. *Regents*, 140 S. Ct. at 1913. DHS recognized that the Final Memorandum implicated State reliance interests, including "costs related to additional incarceration" of affected aliens, "post-release supervision" of those aliens, and the additional education, healthcare, and social-services costs that the States would have to absorb due to the Final Memorandum's extra-statutory framework. JA.141; JA.150. But DHS did not meaningfully address why it rejected those reliance interests.

Petitioners insist (at 35) that DHS addressed the States' reliance interests because DHS's "Considerations Memo includes an entire section entitled 'Impact on States.'" But much of that section does not even address reliance interests. To the contrary, DHS admitted that they it *didn't* address costs because it found the question "uniquely difficult." JA.150-51. Instead of attempting to determine the States' costs, DHS asserted that there was "good reason to believe that any effects" were "unlikely to be significant." JA.153.

Ultimately, DHS dismissed the States' concerns in a single paragraph stating that "no such reasonable reliance interests exist" because (1) DHS was "unaware of

any State that has materially changed its position to its detriment as a result of" previous policies, and (2) reliance would be "unreasonable in [the] light of" the Executive's history of enforcement discretion. JA.154-55.

This so-called analysis was inadequate. The statement "that a factor was considered" is "not a substitute for considering" it. *Gerber v. Norton*, 294 F.3d 173, 185 (D.C. Cir. 2002); *Getty v. Fed. Sav. & Loan*, 805 F.2d 1050, 1055 (D.C. Cir. 1986). The first rationale is also legally defective: the same was true in *Regents*, nevertheless this Court found the failure to consider State reliance interests fatal. *See* 140 S. Ct. at 1914. And the second rationale fails because DHS has repeatedly disclaimed the discretion it now insists upon.[5] It was reasonable for the States to rely on the federal government's decades-long interpretation that section 1226(c) mandates detention. DHS's failure to consider those interests as well as other aspects of the problem render the Final Memorandum arbitrary and capricious.

C. The Final Memorandum is procedurally invalid for lack of notice and comment.

The Final Memorandum is procedurally invalid because DHS never undertook notice-and-comment procedures.

1. Agency actions with "the force and effect of law" must generally be promulgated through notice and comment. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019); 5 U.S.C. § 553(b). Agency actions promulgating a "substantive regulatory change" fall within this category.

[5] *Supra* pp. 4-5; *cf., e.g.*, Reply Br. at *7, *Albence v. Guzman Chavez*, No. 19-897, 2020 WL 3124376 (Mar. 14, 2020); Oral Arg. Tr. at *9, *Nielsen*, 2018 WL 4922082; Pet. Br. at *26, *Reno*, 2000 WL 1784982; *Matter of Garvin-Noble*, 21 I. & N. Dec. at 678.

U.S. Telecom Ass'n v. FCC, 400 F.3d 29, 35 (D.C. Cir. 2005). This includes agency actions that create a "safe harbor" preventing the agency from taking enforcement actions, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 598-99 (2016), "set forth bright-line tests to shape and channel agency enforcement," *Alaska v. Dep't of Transp.*, 868 F.2d 441, 447 (D.C. Cir. 1989), or purport to "alter[] the immigration laws" affecting removability on a class-wide basis, *Regents*, 140 S. Ct. at 1927 (Thomas, J., concurring in part).

The Final Memorandum substantively changes the regulatory regime in multiple respects. It functionally confers a safe harbor on removable aliens by limiting immigration officers' authority to detain them, JA.112, and *removing* "bright lines" that the INA establishes, JA.113. It implements mechanisms that significantly tie immigration officers' hands. *See* JA.311. And it provides aliens a right of review if they believe their rights under the Final Memorandum were violated. JA.309-10.

The Final Memorandum also contains the hallmark of any rule: "[i]t commands, it requires, it orders, it dictates." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) (Kavanaugh, J.). It instructs immigration officers: "[w]hether a noncitizen poses a current threat to public safety is not to be determined according to any bright lines." JA.113. That determination instead "requires an assessment of the individual." *Id.* "[P]ersonnel must evaluate the individual and the totality of the facts." JA.115. And officers "must ensure that enforcement actions . . . do not lead to inequitable outcomes." JA.116. Even petitioners invoke the Final Memorandum's "uniform[ity]." Pet. Br. 37.

Petitioners contend (at 37) that the Final Memorandum does not "create any right or benefit, substantive or

procedural, enforceable at law" because the Final Memorandum asserted as much. JA.120. But "courts have long looked to the *contents* of the agency's action, not the agency's self-serving *label*, when deciding whether statutory notice-and-comment demands apply." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019).

2. Petitioners are also wrong that the Final Memorandum was exempt from notice and comment as either a "general statement[] of policy" or a "rule[] of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). "Agencies have never been able to avoid notice and comment simply by mislabeling their substantive pronouncements." *Azar*, 139 S. Ct. at 1812.

Policy statements are agency actions that merely "inform the public of [the agency's] views on the proper application" of statutes and rules it administers. *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 809 (2003). They "do[] not have a present-day binding effect," "do[] not impose any rights and obligations," and "genuinely leave[] the agency and its decisionmakers free to exercise discretion." *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988) (cleaned up). But the Final Memorandum has practical binding effect on all immigration officers. *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002). The Final Memorandum strips away the "discretion" that immigration officers previously had to follow the plain text of the statutory commands of sections 1226(c) and 1231(a)(2), without considering multiple extra-statutory factors. JA.113. And it imposes obligations on immigration officers to rigorously abide by, and document their compliance with, the Final Memorandum's priorities—subject to a right for aliens to have their enforcement decisions reviewed. Insofar as Congress "vested" the Secretary of Homeland Security

with delegated authority over subordinates regarding immigration enforcement, Pet. Br. 38 (citing 8 U.S.C. § 1103(a) and 6 U.S.C. § 202(5)), petitioners all but concede the Final Memorandum's binding effect, *see* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 916 (2004) (general statements of policy must be "wholly nonbinding").

3. Petitioners counter (at 39) that "agencies routinely adopt important enforcement policies without notice and comment." Of course, there is no "adverse possession" rule of administrative law that would legitimize a longstanding failure to follow this APA requirement. *Rapanos v. United States*, 547 U.S. 715, 752 (2006). Moreover, an explanation about how the agency will exercise "broad enforcement discretion" may not always require notice and comment. *See Nat'l Mining*, 758 F.3d at 252. But that is only when the agency "merely explains how [it] will enforce a statute or regulation," *id.*—*not* where it announces new binding rules that change the existing regulatory regime. *Cf. id.* at 253.

III. The District Court's Remedy Was Lawful.

The APA authorizes, and the INA does not prohibit, vacating the Final Memorandum. The APA's "set aside" authority allows vacatur of unlawful agency actions, as courts have held for decades. 5 U.S.C. § 706(2). Because that remedy is distinct from injunctive relief, the INA's bar on certain lower-court injunctions does not apply to the district court's order. 8 U.S.C. § 1252(f)(1). But if this Court holds otherwise, it should vacate the Final Memorandum or enjoin its enforcement as section 1252(f)(1) allows.

A. The APA authorizes vacatur.

The APA provides that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be" "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Courts have long relied on the "set aside" authority to vacate unlawful agency actions. Nonetheless, petitioners argue (at 40-44) that the APA does not authorize vacatur. Petitioners are wrong.

1. A court "set[s] aside agency action" by vacating it. 5 U.S.C. § 706(2). When Congress adopted the APA, "set aside" meant "to cancel, annul, or revoke." BLACK'S LAW DICTIONARY 1612 (3d ed. 1933). The APA "reflected a consensus that judicial review of agency action should be modeled on appellate review of trial court judgments." Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 258 (2017). Just five years after the APA's enactment, the Third Circuit explained that section 706(2) "affirmatively provides for vacation of agency action." *Cream Wipt Food Prods. Co. v. Fed. Sec. Adm'r*, 187 F.2d 789, 790 (3d Cir. 1951).

This interpretation harmonizes the "set aside" authority with the rest of the APA. It would be illogical for the APA to allow a court to "postpone the effective date of an agency action" during litigation, 5 U.S.C. § 705, but be powerless to terminate that action if the court concludes the action is "unlawful," *id.* § 706(2). Likewise, section 706(1) suggests that section 706(2) authorizes vacatur. The former allows courts to "compel" agency action while the latter authorizes the inverse. 5 U.S.C. § 706.[6]

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[6] Relatedly, petitioners provide (at 42-43) an incomplete picture of the APA's legislative history. For example, a committee report

2. Petitioners contend (at 40) that section 706(2) is merely a rule of decision and does not authorize vacatur. But "'[s]et aside' usually means 'vacate.'" *V.I. Tel. Corp. v. FCC*, 444 F.3d 666, 671 (D.C. Cir. 2006). DHS claims (at 41) that its interpretation is necessary because section 706(2) covers "agency action, findings, and conclusions," and a court cannot "vacate an agency's 'findings' and 'conclusions.'" Yet courts routinely do just that. *See, e.g.*, *Aragon v. Tillerson*, 240 F. Supp. 3d 99, 120 (D.D.C. 2017) (conclusion); *Fogo De Chao (Holdings), Inc. v. DHS*, 211 F. Supp. 3d 31, 41-42 (D.D.C. 2016) (finding). Petitioners' interpretation also makes section 706(2)'s "hold unlawful" command superfluous. Congress would not have required courts to both "hold unlawful and set aside" rules if a court could "set aside" a rule by merely deeming it unlawful. 5 U.S.C. § 706(2).

Petitioners argue (at 41) that courts cannot vacate statutes and claim their interpretation "aligns ordinary judicial review of agency action with judicial review of legislation." But "the [APA] establishes a unique form of judicial review that differs from judicial review of statutes." Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 950 (2018); *see also* Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1191-92 (2020).

Against this backdrop, vacatur violates no equitable principles. *Contra* Pet. Br. 43. Petitioners' concern (at 43-44) for the "now-familiar problems with nationwide injunctions" is similarly misplaced. Whatever the propriety of a nationwide injunction in any given case, vacatur finds its legitimacy in statutory text. District courts,

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cited by petitioners paraphrases section 706 as involving the "review and *invalidation* of agency action." *Administrative Procedure Act*, S. Doc. No. 79-248, at 40 (1946) (emphasis added).

including the court below, have abided this Court's instruction against injunctions where "a less drastic remedy" "such as partial or complete vacatur" redresses the injury. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010); JA.400-02. This Court has applied the same principle. *Regents*, 140 S. Ct. at 1916 n.7.

3. If accepted, petitioners' interpretation would upend decades of APA decisions. For more than 30 years, vacatur has been "the ordinary result" when the D.C. Circuit "determines that agency regulations are unlawful." *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989). Elsewhere, vacatur is the "default rule." *E.g.*, *Data Mktg. P'ship, LP v. U.S. Dep't of Labor*, 45 F.4th 846, 859 (5th Cir. 2022). And this Court has affirmed lower court decisions vacating administrative action. *See, e.g.*, *Regents*, 140 S. Ct. at 1901 & 1916 n.7.

Petitioners' argument also clashes with *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). *See generally Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998). *Lujan*'s five-Justice majority observed that an "entire" agency program is "affected" by a successful "challenge[] under the APA." *Id.* at 890 n.2. Similarly, *Lujan*'s four-Justice dissent explained that when a "plaintiff prevails" in APA litigation, "the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual." 497 U.S. at 913 (Blackmun, J., dissenting). Against this authority, petitioners cite no case adopting their interpretation. The district court correctly applied section 706(2) to vacate the Final Memorandum.[7]

[7] Petitioners suggest (at 44 n.6) that if the Final Memorandum is vacated, vacatur should apply only to the parties. This atextual argument raises unanswerable questions. "[H]ow could this Court

B. The INA does not bar vacatur of the Final Memorandum.

Section 1252(f)(1)'s "[l]imit on injunctive relief" provides that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of" sections 1221-1232 of Title 8. 8 U.S.C. § 1252(f)(1). The district court correctly concluded that this restriction did not prevent it from vacating the Final Memorandum. JA.400; JA.447-50.

1. "By its plain terms, and even by its title," section 1252(f)(1) "is nothing more or less than a limit on injunctive relief." *Reno*, 525 U.S. at 481. Section 1252(f) confines itself to injunctions through its reference to remedies that "enjoin or restrain." 8 U.S.C. § 1252(f)(1). As "common doublets in legal writing" "restrain and enjoin" are often used as "coupled synonyms." GARNER'S DICTIONARY OF LEGAL USAGE, *supra*, at 295-96. Indeed, dictionaries contemporaneous to the passage of section 1252(f)(1) defined "enjoin" as "restrain by injunction." BLACK'S LAW DICTIONARY 550 (7th ed. 1999).

"Enjoin" and "restrain," independently and as a doublet, refer to injunctive relief. This Court has entered injunctions against parties in its original-jurisdiction docket by holding that they are "enjoined and restrained." *E.g.*, *California v. Arizona*, 452 U.S. 431, 432 (1981). The doublet also frequently appears on district court injunctions like the preliminary injunction entered in this case. *Texas*, 555 F. Supp. 3d at 441.

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vacate the Rule with respect to the . . . plaintiffs in this case without vacating the Rule writ large? What would it mean to 'vacate' a rule as to some but not other members of the public?" *O.A. v. Trump*, 404 F. Supp. 3d 109, 153 (D.D.C. 2019).

At times, "enjoin" and "restrain" refer to injunctions and restraining orders as distinct from one another. For example, Federal Rule of Civil Procedure 65(c) describes the subject of a "preliminary injunction" or "temporary restraining order" as a party "enjoined or restrained." Whether treated as synonyms or references to two types of injunctive relief, "enjoin or restrain" as used in section 1252(f)(1) specifies injunctive relief.

Subsection 1252(f)'s title, "Limit on injunctive relief," confirms this interpretation. 8 U.S.C. § 1252(f). "[T]he heading of a section" is a "tool available for the resolution of a doubt about the meaning of a statute." *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (cleaned up). *Almendarez-Torres* held that another portion of Title 8 authorized a penalty in part because the relevant portion was titled "Criminal *penalties*." *Id.* Similarly, *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991), held that an immigration regulation's "generic reference to 'employment' should be read as a reference to the '*unauthorized* employment' identified in the paragraph's title." Here, section 1252(f)'s "title—'Limit on injunctive relief'—makes clear the narrowness of [the statute's] scope." *Biden v. Texas*, 142 S. Ct. 2528, 2539 (2022). It "prohibits . . . injunctive relief." *Jennings*, 138 S. Ct. at 851.

2. Petitioners (at 47-48) stretch section 1252(f) by giving "enjoin" and "restrain" independent meanings through the rule against surplusage. But an interpretation that section 1252(f) refers to injunctions and restraining orders alike prevents surplusage. And in any event, "that canon can be appropriately discounted" "[w]hen a drafter has engaged in the retrograde practice of stringing out synonyms and near-synonyms." SCALIA, *supra*, at 179. "Sometimes drafters *do* repeat themselves

and *do* include words that add nothing of substance . . . . Doublets and triplets abound in legalese." *Id.* at 176-77. Section 1252(f)(1)'s employment of a common doublet is highlighted by a House report characterizing the section. H.R. Rep. No. 104-469, pt. 1, at 161 (1996). The report twice describes the section as covering only orders that "enjoin" despite the draft statute's "enjoin or restrain" text. *Id.*

Moreover, interpreting "enjoin or restrain" in section 1252(f)(1) as referring either to injunctions and temporary restraining orders or as a common legal doublet addresses petitioners' concern (at 47-48) for "interpretive problems" in section 1252(f)(2). Subsection (f)(2) emerged out of a conference committee more than a year after subsection (f)(1) was originally proposed and uses only "enjoin." *Compare* H.R. 1915, 104th Cong. § 306(a) (1995), *with* H.R. Rep. No. 104-828, at 67 (1996). But "enjoin" can mean "restrain," *supra* p. 44, and can be synonymous with "enjoin and restrain." Subsections (f)(1) and (2) cover the same orders: injunctive relief.

3. Contrary to DHS's contention (at 45), a court does not enter injunctive relief or do something "practically equivalent" when it vacates agency action. "[A]n injunction is a judicial process or mandate operating *in personam* by which, upon certain established principles of equity, a party is required to do or refrain from doing a particular thing." BLACK'S LAW DICTIONARY 937 (11th ed. 2019) (quoting 1 HOWARD C. JOYCE, A TREATISE ON THE LAW RELATING TO INJUNCTIONS § 1, at 2-3 (1909)).

Vacatur does not operate *in personam*, and it does not involve coercion as petitioners (at 47) assert. Vacatur operates against a challenged action, is self-executing, and is accomplished through the court's order. It operates "in the same way that an appellate court formally

revokes an erroneous trial-court judgment." Mitchell, *supra*, at 1012.

Nor does vacatur "require[] officials" to do or "refrain" from anything. Pet. Br. 45 (quoting *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2065 (2022)) (cleaned up). Like the revocation of a court order, judicial annulment of administrative action may alter a party's conduct, but it does not order anyone to do anything. Vacatur is thus not "coercive." Pet. Br. 46 (quoting *Aberdeen & Rockfish R.R. v. S.C.R.A.P.*, 422 U.S. 289, 307 (1975)).

The two remedies differ in additional ways. "An injunction is a[n] . . . extraordinary remedy," *Monsanto*, 561 U.S. at 165, while vacatur is "the ordinary result," *Harmon*, 878 F.2d at 495 n.21. Injunctions "should not be granted as a matter of course," *Monsanto*, 561 U.S. at 165, but vacatur is the "default," *Data Mktg. P'ship, LP*, 45 F.4th at 859. Injunctions require showing "an irreparable injury," and both "the public interest" and "the balance of hardships between the plaintiff and defendant" must favor injunctive relief. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). Vacatur's "less drastic remedy," *Monsanto*, 561 U.S. at 165, requires none of those showings.

4. Whatever ambiguity exists in section 1252(f) favors the States' interpretation permitting vacatur. "[T]his Court applies a 'strong presumption' favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015) (citation omitted). "This default rule is 'well-settled,' and Congress is presumed to legislate with it in mind." *Salinas v. U.S. R.R. Ret. Bd.*, 141 S. Ct. 691, 698 (2021) (citation omitted). "[T]he burden for rebutting it is 'heavy,'" and is met "when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct." *Smith v.*

Berryhill, 139 S. Ct. 1765, 1776-77 (2019) (quoting *Mach Mining*, 575 U.S. at 486). Here, section 1252(f)'s title and text both confirm the opposite. Petitioners' argument "would likely insulate virtually every rule related to the INA from judicial review," JA.449, and should be rejected.

C. If the district court erred, this Court should vacate or enjoin the Final Memorandum.

This Court should provide a remedy if it agrees with the States as to their standing and the merits but accepts either of petitioners' remedy arguments. If the APA does not authorize vacatur, this Court should enter an injunction as only it can. *See Biden*, 142 S. Ct. at 2538-39. If the APA authorizes vacatur but section 1252(f)(1) precludes the district court's vacatur of the Final Memorandum, this Court should vacate the Memorandum.

1. Section 1252(f)(1) does not restrict this Court's authority on its own terms. *Biden*, 142 S. Ct. at 2539-40. The All Writs Act authorizes this Court to issue injunctions, 28 U.S.C. § 1651, and nothing in the APA limits vacatur to district courts, 5 U.S.C. §§ 703, 706(2). The live complaint seeks both remedies as well as declaratory relief. JA.107; *see also* JA.393. Petitioners (at 48) concede that those remedies are always available from this Court.

2. The States are entitled to vacatur for the reasons discussed in Part II. If vacatur is unavailable, this Court should permanently enjoin petitioners' implementation and enforcement of the Final Memorandum. A plaintiff seeking a permanent injunction must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and

(4) that the public interest would not be disserved by a permanent injunction. *eBay Inc.*, 547 U.S. at 391.

The States satisfy all four requirements. *First*, the States have suffered an irreparable injury for the same reasons they have suffered an injury-in-fact. *Supra* pp. 13-15. The Final Memorandum has and will inflict significant unrecoverable financial costs on the States, including healthcare, education, and correctional services. *Second*, remedies at law are inadequate. Sovereign immunity prevents the States from recovering money damages from petitioners. *Third*, the balance-of-hardships and public-interest elements merge where, as here, the government is the defendant. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Just as "[t]here is always a public interest in prompt execution of removal orders," there is always a public interest in the detention of criminal aliens consistent with Congress's mandates. *Id.* at 436. Such aliens' non-detention "'permits and prolongs a continuing violation of United States law.'" *Id.* (quoting *Reno*, 525 U.S. at 490) (cleaned up).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

JEFF LANDRY
Attorney General of Louisiana

ELIZABETH B. MURRILL
Solicitor General

JOSEPH S. ST. JOHN
Deputy Solicitor General

LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third St.
Baton Rouge, Louisiana 70802
(225) 326-6766

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JUDD E. STONE II
Solicitor General
Counsel of Record

ARI CUENIN
BENJAMIN D. WILSON
Deputy Solicitors General

ERIC J. HAMILTON
RYAN S. BAASCH
Assistant Solicitors General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Judd.Stone@oag.texas.gov
(512) 936-1700

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